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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. 77-547

JEFFREY SCOTT FREELAND
Petitioner,

vs.

UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. _____

JEFFREY SCOTT FREELAND
Petitioner,

vs.

UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Jeffrey Scott Freeland, prays that a WRIT OF CERTIORARI issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on September 12, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (Case No. 76-2476), as yet unreported, is presented in the Appendix, infra, at pp. 1a-6a. The Opinion of the

Court of Appeals affirmed the Judgment of the District Court for the Eastern District of Kentucky (Indictment No. 76-21) rendered September 20, 1976, which Judgment and commitment appears in the Appendix at p. 7a, and accompanying Memorandum Opinion (filed September 20, 1976) appears in the Appendix at p. 9a.

JURISDICTION

The Opinion of the Court of Appeals for the Sixth Circuit was entered September 12, 1977, (See Appendix, infra). This petition for certiorari was filed, pursuant to Rule 22 (1.) of the RULES OF THE SUPREME COURT OF THE UNITED STATES, within thirty days of said entry, or with such additional time as granted this petitioner under Rule 34 (2.) of said Rules. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

Mr. Freeland, the Petitioner herein, was found guilty, in a nonjury trial in the District Court for the Eastern District of Kentucky, of knowingly delivering a firearm to a common carrier for shipment in interstate commerce without written notice, in violation of 18 U.S.C. Sec. 922 (e) (1970). (See, Indictment, Appendix, infra p. 15a). Mr. Freeland's Motion to Suppress, infra, Appendix p. 16a, was previously overruled by the District Court.

The questions arising in these proceedings and presented to this Court for review are as follows:

1. Whether the search of Mr. Freeland's bag at the airport, which bag was intended to be part of "checked" baggage, and *not* "carry-on", without clear, unequivocal

and informed consent by Mr. Freeland, constituted an illegal search, and, therefore, that Mr. Freeland's Motion to Suppress should have been sustained.

2. Whether the search of Mr. Freeland's bag at the airport by airport security personnel, in view of FAA regulations regarding airport security, constituted governmental involvement so as to bring the search within the proscriptions of the Fourth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

The CONSTITUTION of the United States, at Amendment IV, Searches and Seizures, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

This case arose as a result of the arrest of Mr. Jeffrey Scott Freeland on April 16, 1976, at the Greater Cincinnati Airport, Boone County, Kentucky. Mr. Freeland was subsequently, on May 3, 1976, indicted in the United States District Court for the Eastern District of Kentucky (Indictment No. 76-21), on the charge that he "knowingly did deliver, and caused to be delivered to Delta Airlines, a common carrier, a suitcase in which there was a firearm, that is, a Browning automatic 9 millimeter pistol, for shipment in interstate commerce from Boone County, Kentucky to Miami, Florida, to himself, a person other than

a licensed importer, manufacturer, dealer or collector of firearms, without having given written notice to said carrier that said firearm was being transported."

On April 16, 1976, Jeffrey Scott Freeland presented himself at the Delta Airlines ticket counter at the Greater Cincinnati Airport, Boone County, Kentucky, to purchase an airline ticket for passage to Miami, Florida. After a brief encounter with the Delta ticket agent, Carl Patterson, it was determined by Mr. Patterson that Mr. Freeland met the elements of a "profile" then in use by Delta Airlines. Mr. Freeland delivered to Delta Airlines, at the ticket counter, one suitcase to be checked through to Miami. Mr. Patterson summoned his supervisor, Mr. Rayburn Miller, for assistence by reason of Mr. Freeland's matching the elements of their "profile". Mr. Miller then removed the suitcase upstairs to another level of the air terminal, requesting Mr. Freeland to accompany him, and at the same time, related to Mr. Freeland that the bag would have to be x-rayed. Saying nothing more, Mr. Miller placed the suitcase on the conveyer to the x-ray machine and caused the suitcase to be x-rayed. One of the operators of the x-ray units, Kaye Reeves, determined that there was an unidentifiable object inside the suitcase. The suitcase was then opened by a security employee, Miss Kathy Noakes; Miss Noakes testified that she told Mr. Freeland that the bag would have to be opened to which statement she said Mr. Freeland replied with a shrug; Mr. Freeland testified that the bag was opened before he reached the end of the conveyor belt on which the suitcase was carried to Miss Noakes and that he did not assent to its search. Upon opening the suitcase, Miss Noakes determined that there was contained therein, a gun. Mr. Freeland was then arrested for knowingly delivering a firearm to a common carrier.

A Motion to Suppress Evidence (filed May 28, 1976), (Appendix p. 16a) asserting that a search of the suitcase involved in Mr. Freeland's arrest was unlawful, was heard by the Honorable Eugene E. Siler, Jr., Judge, United States District Court, Eastern District of Kentucky, on June 28, and July 28, 1976, and was denied by Judge Siler on September 7, 1976. A trial was had before Judge Siler, who, after hearing the evidence on September 7, 1976, rendered a finding of Guilty as charged against Mr. Freeland (written Judgment and Opinion filed September 20, 1976). (Appendix p. 7a).

The Decision of the District Court was affirmed by Opinion of the United States Court of Appeals for the Sixth Circuit filed September 12, 1977, (See Appendix p. 1a).

ARGUMENTS FOR GRANTING THE WRIT

Mr. Freeland did not consent.

It is well settled that a warrantless search may be justified if the person searched has voluntarily given his consent; and in so giving his consent, intentionally relinquished his Fourth Amendment Constitutional rights to protection against such searches. To be valid, however, such waiver must be an intentional relinquishment or abandonment of a known right or privilege to withhold such consent. This basic premise of requiring intentional, informed waiver has been found applicable to searches and seizures affecting aircraft passengers and their luggage, and was clearly articulated in *U.S.* v. *Meulener*, 351 F. Supp. 1284, 1287 (1972), as follows:

> "A search may be justified if the subject's voluntary consent has been given. However, consent to a search amounts to a waiver of a constitutional right, and:

"waiver, in this context, means the 'intentional relinquishment of a known right or privilege.' *Johnson* v. *Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Such a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the office (r) a license which the person knows may be freely and effectively withheld . . . *Cipres* v. *United States,* 343 F. 2d 95, 97 (9th Cir. 1965)."

"To meet constitutional requirements, the consent must be proved, by clear and positive evidence, to be voluntary, unequivocal, specific and intelligently given rather than resulting from duress or coercion, whether actual or implied. *United States* v. *Como,* 340 F. 2d 891, 893 (2d Cir. 1965); *United States* v. *Smith,* 308 F. 2d 657, 663, (2d Cir. 1962), cert. denied, 372 U.S. 906, 83 S.Ct. 717, 9 L.Ed. 2d 716 (1963)."

United States v. *Bell,* 335 F. Supp. 797, 803 (E.D.N.Y. 1971)

(See also, *U.S.* v. *Lopez,* 328 F. Supp. 1077, 1092 (1971); *U.S.* v. *Davis,* 482 F. 2d 893, 913-914 (1973); *U.S.* v. *Allen,* 349 F. Supp. 749 (1972). The question of consent is one of fact considering the particular circumstances involved, but the consent is not to be lightly inferred, and must be shown by the Government by clear and convincing evidence to have been freely and voluntarily given (See, e.g. *U.S.* v. *Meulener,* supra; *U.S.* v. *Lopez,* supra; *U.S.* v. *Miles,* 449 F. 2d 1272 (1971); *U.S.* v. *Allen,* supra; *United States* v. *Ruiz-Estrella,* 481 F. 2d 723 (1973). The opinion of the Court of Appeals for the Sixth Circuit in its decision herein is in conflict with this principle where it stated, at p. 4 of its decision:

"Where a motion to suppress evidence has been made, the burden of establishing that the evidence was

secured by an unlawful search is on the moving party. *E.g., United States* v. *Wright,* 468 F. 2d 1184, 1185-86 (6th Cir. 1972), *cert. denied* 412 U.S. 938 (1973). It was thus incumbent upon Freeland to demonstrate that sufficient governmental involvement existed to invoke the proscriptions of the Fourth Amendment."

The Courts below held in part:

"that a person who proceeds to attempt to board a plane in the face of widespread publicity about the probability of air piracy and specific airport notices concerning the security measures which are employed to detect potential hijackers consents to a limited search of his person and hand baggage."

and in so holding, relied upon *United States* v. *Dalpiaz,* 494 F. 2d 374 (6th Cir. 1974) and *United States* v. *Davis,* 482 F. 2d 893 (9th Cir. 1973). The Court recognized, however, that "There are apparently no cases involving searching of baggage to be checked".

Though widespread publicity may be an important consideration, and has been so considered in recent court decisions (citations omitted), *Dalpiaz* involved a totally different set of facts, *viz* carry-on luggage search and implied consent to limited search (of carry-on luggage or person) in the face of widespread publicity concerning air piracy.

In the context of widespread publicity as a basis for justifying a search, both *Dalpiaz* and *Davis* held that such preboarding searches are valid only if the person is given the opportunity to avoid the search by electing not to board the aircraft. Such publicity, even taken with a profile fit, has been held *not* to justify such search where the person searched was not made aware of his option to avoid search by electing not to board the aircraft (*United States* v. *Ruiz-Estrella,* supra).

The lower Courts further relied upon a sign, introduced into evidence, in establishing consent. This sign was posted at the ticket counter. It has been held that:

> "The fact that a passenger continued aircraft boarding process after reading posted and clearly observable signs stating 'PASSENGERS AND BAGGAGE SUBJECT TO SEARCH' did not amount to implied consent." (*United States* v. *Lopez,* supra)

In *Lopez,* there was no express consent, and the Court held that to hold that consent could be implied would be inherently coercive (*Lopez,* at p. 1093). In *United States* v. *Edwards,* 498 F. 2d 496 (2d Cir. 1974), also relied upon by the District Court, a sign stated "Passengers and Baggage Subject to Search" only in combination with announcement over loudspeaker that baggage *will* be searched constituted consent of *carry-on* baggage. It is well settled that a passenger has not so impliedly consented to search of his baggage by presenting himself for boarding at the airport, (*U.S.* v. *Allen,* supra) and silence or acquiescence in official action does not amount to consent. (*U.S.* v. *Meulener; U.S.* v. *Lopez; U.S.* v. *Allen,* supra). Even if the airline has the right to require a search as a condition of boarding the aircraft, the passenger must be informed of his option to avoid the search by choosing not to board the aircraft. (*U.S.* v. *Allen; U.S.* v. *Meulener; U.S.* v. *Davis; U.S.* v. *Dalpiaz,* supra). It is clear that the procedures, such as use of a "profile", for the protection of aircraft from illegal acts of prospective passengers require certain action on the part of airline employees or Government agents in the event that a particular prospective passenger becomes suspect; these include request and consent of the suspect passenger to a search of his luggage, (*U.S.* v. *Slocum,* 464 F.2d 1180 (1972), after fully informing him of his alternatives.

Governmental Involvement

The search of Mr. Freeland's bag was part of a national policy performed within regulations prescribed by the Federal Aviation Administration (See 14 C.F.R. Sec 121.538). These regulations provided in part as follows:

> 121.538 Aircraft Security
>
> * * *
>
> "(b) Each certificate holder, shall adopt and put into use a screening system, acceptable to the Administrator, that is designed to prevent or deter the carriage aboard its aircraft of any explosive or incendiary device or weapon in carry-on baggage or on or about the persons of passengers, except as provided in Sec. 121.-585, and the carriage of any explosive or incendiary device in checked baggage. Each certificate holder shall adopt and put into use its security program prescribed in paragraph (c) of this section."

The Court of Appeals below held in part at p. 3 of its decision:

> "Contrary to the suggestion in the district court's opinion, we do not believe that all searches of passengers' luggage at airports are invariably subject to the proscription of the Fourth Amendment. Rather, the question of governmental involvement in the search is determined by the particular facts at hand. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 722 (1961). *See United States* v. *Burton,* 475 F. 2d 469, 471 (8th Cir. 1973); *United States* v. *Mitchell,* 352 F. Supp. 38, 42-43 (E.D. N.Y. 1972), *aff'd without opinion* 486 F.2d 1397 (2d Cir. 1973). Here the search was in fact carried on by private security personnel engaged by the airlines. We find nothing in the record to indicate that they were deputized or otherwise agents acting under governmental direction or authority."

This is in conflict with the holding of the 9th Circuit in *U.S.* v. *Davis,* supra, wherein that court held, at 482 F. 2d 904:

> The government's role in the airport search program is and has been a dominant one. But even if governmental involvement at some point in the period could be characterized accurately as mere "encouragement," or as "peripheral, or . . . one of several cooperative forces leading to the [alleged] constitutional violation," *see* United States v. Guest, 383 U.S. 745, 755-756, 86 S.Ct. 1170, 1177, 16 L.Ed.2d 239 (1966), that involvement would nevertheless be "significant" for purposes of the Fourth Amendment. Constitutional limitations on governmental action would be severely undercut if the government were allowed to actively encourage conduct by "private" persons or entities that is prohibited to the governmt itself.[29]
>
> It makes no difference that the act of opening appellant's briefcase was accomplished by a "private" airline employee rather than a "public" official. The search was part of the overall, nationwide anti-hijacking effort, and constituted "state action" for purposes of the Fourth Amendment.

CONCLUSION

Based on the foregoing, the Decision of the Court of Appeals affirming Mr. Freeland's conviction is:

1. contrary to previous decisions of the United States Supreme Court;

2. inconsistent with holdings of other United States Courts of Appeals;

3. in violation of Mr. Freeland's rights under the Fourth Amendment.

Therefore, for these reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit affirming the conviction of Mr. Freeland.

Respectfully submitted,

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IN THE

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OCTOBER TERM 1977

No. _____

JEFFREY SCOTT FREELAND

Petitioner,

vs.

UNITED STATES OF AMERICA,

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

No. 76-2476

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JEFFREY SCOTT FREELAND, *Defendant-Appellant.*	APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed September 12, 1977.

Before: PHILLIPS, Chief Judge; WEICK and ENGEL, Circuit Judges.

ENGEL, Circuit Judge. Defendant Freeland was found guilty in a non-jury trial of knowingly delivering a firearm to a common carrier for shipment in interstate commerce without written notice, in violation of 18 U.S.C. § 922 (e) (1970).

The sole issue in Freeland's appeal is the validity of the search of his luggage at the Greater Cincinnati Airport which produced the gun. Following a hearing on Freeland's motion to suppress, the district court ruled that he had consented to the search and that in any event, it

was valid under *United States* v. *Dalpiaz*, 494 F. 2d 374 (6th Cir. 1974). We affirm.

Shortly before flight time on the evening of Friday, April 16, 1976, Jeffrey Scott Freeland presented himself at the Delta Airlines ticket counter in the Greater Cincinnati Airport for the purpose of purchasing a one-way passage to Miami, Florida, which he had earlier reserved under the fictitious name of Floyd Perry. Ticket Agent Harold Patterson was suspicious of Freeland because he appeared to meet certain elements of a hijacker profile then in use by Delta Airlines. When Freeland sought to pay cash for the ticket and failed to produce any personal identification, Patterson summoned his supervisor, Rayburn Miller. On Miller's instructions Patterson issued the ticket. Meanwhile, Freeland had placed his suitcase on the weight scale next to the counter to be checked through to Miami. There was no indication that it was to accompany him personally on the plane. Nevertheless, Miller, after placing the baggage ticket on the suitcase, told Freeland that the suitcase would have to be x-rayed. Miller accordingly picked up the bag and asked Freeland to follow him. Together they went upstairs to the passenger screening area where Miller placed the suitcase on the conveyor to be x-rayed. One of the operators of the x-ray units, Kay Reeves, observing an unidentifiable object on the inside of the suitcase, asked a fellow employee, Kathy Noakes to "hand check it". Reeves and Noakes were both involved in the pre-screening of passengers and had been furnished to Delta Airlines for that purpose by the Wackenhut security agency. While the defendant disputed it, the trial court accepted the testimony of Ms. Noakes that she told Freeland that the bag would have to be opened, and that he replied with a shrug. Upon opening the suitcase, the gun was discovered. Ms. Noakes promptly summoned Sergeant Wendell Kegley of the Cincinnati Airport police. Upon his arrival Kegley observed the firearm which had already been discovered in the suitcase and arrested Freeland.

On the foregoing facts the government urged before the district court that Ms. Noakes' opening of Freeland's bag was a search by a nongovernmental airline employee and was not subject to the Fourth Amendment. The district court, on the other hand, ruled that "the search was part of a national policy and was done within the regulations prescribed by the Federal Aviation Administration",[1] and was therefore subject to Fourth Amendment scrutiny, relying on the authority of *United States* v. *Davis*, 482 F. 2d 893 (9th Cir. 1973). *See also United States* v. *Fannon*, 46 U.S.L.W. 2049.

Federal Aviation Administration regulations require the presence of at least one law enforcement officer at the point of and throughout the final passenger screening process prior to boarding[2] and define that officer as one who is not only authorized to carry and use firearms, but who is vested

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[1] *See* 14 C.F.R. § 121.538.

[2] 14 C.F.R. 107.4 provides:

> [E]ach airport operator shall, not later than January 6, 1973, submit for approval by the Administrator an amendment to the master security plan included in its security program that sets forth facilities and procedures which insure that as soon as possible, but in no event later than February 6, 1973 —
>
> (a) At least one law enforcement officer is present at the point of, and prior to and throughout, the final passenger screening process prior to boarding, for each flight conducted by a certificate holder required to have a security program under § 121.538 of this chapter, and by each foreign air carrier that requests such law enforcement support;
>
> (b) The law enforcement officer is present continuously until all doors on the aircraft being boarded are closed and the aircraft has taxied away from the boarding area . . . .

with a police power of arrest under federal, state, or other governmental authority. 14 C.F.R. § 107.1 (e).

Contrary to the suggestion in the district court's opinion, we do not believe that all searches of passengers' luggage at airports are invariably subject to the proscription of the Fourth Amendment. Rather, the question of governmental involvement in the search is determined by the particular facts at hand. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 722 (1961). *See United States* v. *Burton,* 475 F. 2d 469, 471 (8th Cir. 1973); *United States* v. *Mitchell,* 352 F. Supp. 38, 42-43 (E.D. N.Y. 1972), *aff'd without opinion* 486 F. 2d 1397 (2d Cir. 1973). Here the search was in fact carried on by private security personnel engaged by the airlines. We find nothing in the record to indicate that they were deputized or otherwise agents acting under governmental direction or authority. Apparently Reeves and Noakes did not conceive that they had any authority to effectuate an arrest since they called upon the airport police sergeant for this purpose.

Where a motion to suppress evidence has been made, the burden of establishing that the evidence was secured by an unlawful search is on the moving party. *E.g., United States* v. *Wright,* 468 F. 2d 1184, 1185-86 (6th Cir. 1972), *cert. denied* 412 U.S. 938 (1973). It was thus incumbent upon Freeland to demonstrate that sufficient governmental involvement existed to invoke the proscriptions of the Fourth Amendment.

Assuming, however, because the district court did, that the Wackenhut personnel effecting the search were law enforcement officers within the meaning of FAA regulations and measuring the search and seizure by Fourth Amendment standards, we have no difficulty in agreeing with the district court that Freeland consented to the search of his luggage. As the district court found:

> Although Miller did not tell Freeland he could withdraw the bag or refuse to board, nevertheless, a sign was posted at the ticket counter advising Freeland of this and that checked baggage could be examined. Had Freeland asked for the bag back, Miller would have allowed him the bag and would have allowed him not to board the plane.

Our review of the testimony convinces us that the trial judge's holding is fully supported by the record.

As observed by Mr. Justice Stewart in *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 227 (1973),

> . . . the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the meaning of a 'voluntary' consent — the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.

Both such concerns were fully accommodated here. The need of the airport officials to satisfy themselves that it was safe to accept the luggage for transportation to Miami was altogether compelling. As we did in *Dalpiaz, supra,* 494 F. 2d at 378, we approve without repeating the language of Judge Gewin in *United States* v. *Moreno,* 475 F. 2d 44, 49 (5th Cir.) *cert. denied,* 414 U.S. 840 (1973). Coercion was altogether lacking here. There is nothing to indicate that Freeland could not have withdrawn the baggage. There appears to have been nothing threatening in the conduct of the persons involved. The occurrence

took place in the public areas of the airport. Freeland was not arrested or even personally restrained until after the bag had been opened and a police officer had been summoned.

It is true that, unlike *Dalpiaz,* Freeland's baggage was to be checked through and was not to accompany him inside the passenger compartment, where the bag's contents might have posed the threat of direct use. The risk remained, however, that stored baggage could hold explosives or other material posing danger to the craft, given today's sophistication in their use.

A respect for the very real obligation of the airlines to protect the passengers entrusted to their care demands that the reasonableness of their conduct be measured against the very real risks they seek to avoid. As long as Freeland could have freely withdrawn his baggage from the flight and avoided the search, we see no impediment in holding that his failure to do so amounted to a consent to the search.

Affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CRIMINAL NO. 76-21

UNITED STATES OF AMERICA,
PLAINTIFF,

vs.

JEFFREY SCOTT FREELAND,
DEFENDANT.

JUDGMENT AND COMMITMENT

(Filed September 20, 1976)

On September 7, 1976, came the defendant in person and by counsel, Raymond White and Thomas C. Smith.

IT IS ADJUDGED that the defendant has been convicted upon the finding of the Court of his guilt of delivering to common carrier, concealed firearm for interstate shipment without giving notice to carrier in violation of Title 18, Sec. 922 (e) U.S. Code as charged in the indictment, and the Court having asked the defendant and his attorneys whether they had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is a youth offender under twenty-two years of age at the time of conviction and that the offense is punishable by imprisonment under applicable provision of law other than the Youth Corrections Act.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for supervision and treatment under the Federal Youth Corrections Act until discharged by the Youth Correction Division of the Board of Parole, as provided in Secs. 5010 (b) and 5017 (c), Title 18, U. S. Code.

IT IS ORDERED that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of defendant.

This 20 day of September, 1976.

/s/ EUGENE E. SILER, JR. JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CRIMINAL NO. 76-21

UNITED STATES OF AMERICA,
PLAINTIFF,

vs.

JEFFREY SCOTT FREELAND,
DEFENDANT.

MEMORANDUM OPINION

(Filed September 20, 1976)

This matter is before the Court on Motion by the defendant to suppress the firearm, to wit, a Browning semi-automatic 9mm pistol, taken from the luggage of the defendant at the Greater Cincinnati Airport on April 16, 1976. For reasons stated below the Court will by separate order overrule the motion.

FINDINGS OF FACTS

On April 16, 1976, the defendant, Jeffrey Scott Freeland, a resident of Dayton, Ohio, went to the Greater Cincinnati Airport, Boone County, Kentucky, to board an airplane for Miami, Florida. Accompanying him to the airport was a friend, Jerry Thomas.

Freeland had not purchased a ticket in advance, but he had a reservation in the fictitious name of Floyd Perry. Thomas went to another area in the airport and told the

ticket agent, Carl Patterson, that he wanted to buy a ticket to Miami, that his name was Floyd Perry. He had one bag to check. He purchased with cash a one-way, single-coupon (meaning no changes along the way) air ticket from Cincinnati to Miami. When the ticket agent asked him if he had any identification, Freeland told the agent he did not. The agent then asked if there was someone else at the airport who could identify him and Freeland replied there was not.

The agent then called his supervisor, Ray Miller, since Freeland met their "profile" (the testimony for which was heard in Court out of the presence of the defendant, but in the presence of defense counsel). When Miller arrived at the ticket counter, the agent gave the airline ticket to Miller and Miller picked up the bag Freeland attempted to check through to Miami. Miller told Freeland that the bag would have to be x-rayed and to follow him.

Although Miller did not tell Freeland he could withdraw the bag or refuse to board, nevertheless, a sign was posted at the ticket counter advising Freeland of this and that checked baggage could be examined.[1] Had Freeland

[1] The sign, introduced into evidence, stated as follows:

> Passengers with checked
> baggage are advised of
> recently enacted
> FAA Regulations, which
> may require:
> — inspection of
> checked baggage
> — passengers to
> present identification
> Passengers may refuse inspection
> Passengers refusing inspection
> may not be transported
> *U.S. Department of Transportation*
> Federal Aviation Administration

asked for the bag back, Miller would have allowed him the bag and would have allowed him not to board the plane.

Miller took Freeland to the security check-point, where luggage and passengers are run through magnetometers and/or x-ray machines. At the check-point, Miller put the bag on a conveyor belt of the x-ray machine and the bag was x-rayed. One of the private security force operating the x-ray machine saw that a square unidentifiable object showed up inside the suitcase. Katherine Noakes, another of the security force, took the bag off the belt and told Freeland, "I'll have to look inside." Freeland shrugged his shoulders and Noakes then opened the bag and found the firearm along with a large quantity of cash inside an inner bag.

The Court finds the defendant's actions at the airport met the Federal Aviation Administration "profile" of persons who are most likely to attempt to hijack or damage an aircraft.

The Court further finds that by virtue of the sign posted at the ticket counter and wide-spread publicity, Freeland knew or should have known of his right to refuse to board and that he and his baggage were subject to search prior to boarding.

CONCLUSIONS OF LAW

There are apparently no cases involving searching of baggage to be checked, as in this case, perhaps since the search of checked baggage was not instituted until recently. Such searches were precipitated by a bomb left in checked baggage in LaGuardia Airport in New York within the last year or two, resulting in the death and injury of many persons.

However, there is still adequate language from other cases which would apply to this situation. For instance, each such inquiry to determine whether the intrustion was justified and, thus, a reasonable search and seizure under the Fourth Amendment, is done on a case-by-case basis. *United States* v. *Dalpiaz,* 494 F.2d 374 (6th Cir. 1974); *United States* v. *Moreno,* 475 F.2d 44 (5th Cir.), *cert. denied,* 414 U.S. 840 (1973).

It has been held that a person who proceeds to attempt to board a plane in the face of wide-spread publicity about the probability of air piracy and specific airport notices concerning the security measures which are employed to detect potential hijackers consents to a limited search of his person and hand baggage. See *United States* v. *Dalpiaz, supra*; *United States* v. *Davis,* 482 F.2d 893 (9th Cir. 1973). It follows that with the new wide-spread publicity about the LaGuardia bombing and the new signs indicating that checked baggage is subject to search and passengers may refuse to board, then there is a further consent to the limited search of the checked baggage by running it through the x-ray machine to determine if there are explosives inside.

Moreover, searches of passengers and baggage in aircraft boarding situations have become a serious national problem. Thus, it was said in *United States* v. *Edwards,* 498 F.2d 496, 498 (2d Cir. 1974):

> (A)n airport search is not to be condemned as violating the Fourth Amendment simply because it does not precisely fit into one of the previously recognized categories for dispensing with a search warrant, but only if the search is "unreasonable" on the facts.

Moreover, it was held in *United States* v. *Bronstein,* 521 F.2d 459, 462 (2d Cir. 1975):

> There can be no reasonable expectation of privacy when one transports baggage by plane, particularly today when the menace to public safety by the skyjacker and the passage of dangerous or hazardous freight compels continuing scrutiny of passengers and their impediments.

In this case, there was no general inspection of all checked baggage, as there has been of all passengers and hand baggage. Therefore, the selection of this person's baggage for the x-ray must have been based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonable warrant that intrusion." *Terry* v. *Ohio,* 392 U.S. 1, 21 (1968).

The testimony of the airline employees meets that test. The defendant fit the "profile" which the Court finds not to be discriminatory or unreasonable. When the defendant fit the "profile" and could not produce identification, the supervisor, Ray Miller, had every right and perhaps the duty to have the suitcase x-rayed. Thus, when the x-ray showed some unidentifiable object, the security people had a further right to open the bag and look inside, finding the pistol. See *Terry* v. *Ohio, supra.*

At the time of opening the suitcase, the security guard's advising the defendant that the bag would have to be opened was similar to that in *United States* v. *Canada,* 527 F.2d 1374 (9th Cir. 1975), where it was held that consent was given when the defendant said nothing when so advised by the guard.

The United States urges that this is an administrative search by airline employees, not government agents, and thus not prohibited by the Fourth Amendment, see *United States* v. *Issod,* 508 F.2d 998 (7th Cir. 1974). But these cases involved searches of bags under different circumstances, not in accordance with governmental regulations. Here, the search was part of a national policy and was

done within the regulations prescribed by the Federal Aviation Administration and was thus subject to the Fourth Amendment. See *United States* v. *Canada, supra*; *United States* v. *Davis, supra.*

Three cases which should be mentioned in passing are those involving the search of checked baggage of boarding passengers, but at a time before the present policy was instituted. In all three cases, the baggage had been checked and was on the plane or was about to be placed on the plane. In *United States* v. *Palozzo,* 488 F.2d 942 (5th Cir. 1974) ; and *United States* v. *Garay,* 477 F.2d 1306 (5th Cir. 1973), the Court held that the opening of the baggage constituted a violation of the Fourth Amendment to the Constitution. However, in each of those two cases, the suitcase was opened before it was run through an x-day or magnetometer, facts which appear to be significant to this Court, although perhaps not as significant to the Court deciding the cases at the time. On the other hand, in *United States* v. *Cyzewski,* 484 F.2d 509 (5th cir. 1973), after a checked bag activated the magnetometer a subsequent search producing marijuana was justified.

The case at bar appears more closely related to that in *United States* v. *Cyzewski, supra,* where the intrusion was only the running of a detection machine over the outside of the baggage. Moreover, this Court finds that the decisions of *United States* v. *Dalpiaz, supra*; *United States* v. *Skipwith,* 482 F.2d 1272 (5th Cir. 1973) ; and *United States* v. *Moreno, supra,* are applicable. Therefore, in balancing the needs of society against the protected interest of private citizens, the slight intrusion here was justified and thus reasonable under all circumstances.

An order in conformity with this Opinion has already been entered.

This 20 day of September, 1976.

/s/ EUGENE E. SILER, JR., JUDGE

THE INDICTMENT

(Returned and filed May 3, 1976)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

INDICTMENT NO. 76-21
(T. 18, Sec. 922 (e) , USC)

UNITED STATES OF AMERICA

vs.

JEFFREY SCOTT FREELAND

TO THE GRAND JURY CHARGES:

On or about the 16th day of April, 1976, in the Eastern District of Kentucky,

JEFFREY SCOTT FREELAND

knowingly did deliver, and cause to be delivered to Delta Airlines, a common carrier, a suitcase in which there was a firearm, that is, a Browning automatic 9 millimeter pistol, for shipment in interstate commerce from Boone County, Kentucky to Miami, Florida, to himself, a person other than a licensed importer, manufacturer, dealer or collector of firearms, without having given written notice to said carrier that said firearm was being transported.

A TRUE BILL

. . . . . .

FOREMAN

/s/ ELDON L. WEBB
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

INDICTMENT NO. 76-21
(T. 18, Sec. 922 (e) USC)

UNITED STATES OF AMERICA

vs.

JEFFREY SCOTT FREELAND

MOTION TO SUPPRESS

(Filed May 28, 1976)

NOW COMES THE DEFENDANT, JEFFREY SCOTT FREELAND, and moves the Court for an Order to suppress one (1) Browning automatic 9 millimeter pistol, which evidence was obtained by an unlawful search of a suitcase at the Boone County Airport on the 16th day of April, 1976. Said search was unreasonable and in violation of the Fourth Amendment of the UNITED STATES CONSTITUTION.

/s/ RAYMOND A. WHITE
Trial Attorney for Defendant

/s/ THOMAS C. SMITH
Attorney for Defendant

(Memorandum Omitted)